job(s) in the United States for which H–1B nonimmigrant(s) are or will be sought.

(i) What documentation is the employer required to make or maintain, concerning its recruitment of U.S. workers?

(1) The employer shall maintain documentation of the recruiting methods used, including the places and dates of the advertisements and postings or other recruitment methods used, the content of the advertisements and postings, and the compensation terms (if such are not included in the content of the advertisements and postings). The documentation may be in any form, including copies of advertisements or proofs from the publisher, the order or confirmation from the publisher, an electronic or printed copy of the Internet posting, or a memorandum to the file.

(2) The employer shall retain any documentation it has received or prepared concerning the treatment of applicants, such as copies of applications and/or related documents, test papers, rating forms, records regarding interviews, and records of job offers and applicants' responses. To comply with this requirement, the employer is not required to create any documentation it would not otherwise create.

(3) The documentation maintained by the employer shall be made available to the Administrator in the event of an enforcement action pursuant to subpart I of this part. The documentation shall be maintained for the period of time specified in § 655.760.

(4) The employer's public access file maintained in accordance with § 655.760 shall contain information summarizing the principal recruitment methods used and the time frame(s) in which such recruitment methods were used. This may be accomplished either through a memorandum or through copies of pertinent documents.

(j) In addition to conducting good faith recruitment of U.S. workers (as described in paragraphs (a) through (h) of this section), the employer is required to have offered the job to any U.S. worker who applies and is equally or better qualified for the job than the H–1B nonimmigrant (see 8 U.S.C. 1182(n)(1)(G)(i)(II)); this requirement is enforced by the Department of Justice (see 8 U.S.C. 1182(n)(5); 20 CFR 655.705(c)).

[65 FR 80231, Dec. 20, 2000]

§ 655.740 What actions are taken on labor condition applications?

(a) *Actions on labor condition applications submitted for filing.* Once a labor condition application has been received from an employer, a determination shall be made by the ETA Certifying Officer whether to certify the labor condition application or return it to the employer not certified.

(1) *Certification of labor condition application.* Where all items on Form ETA 9035 or Form ETA 9035E have been completed, the form is not obviously inaccurate, and in the case of Form ETA 9035, it contains the signature of the employer or its authorized agent or representative, the Certifying Officer shall certify the labor condition application unless it falls within one of the categories set forth in paragraph (a)(2) of this section. The Certifying Officer shall make a determination to certify or not certify the labor condition application within 7 working days of the date the application is received and date-stamped by the Department. If the labor condition application is certified, the Certifying Officer shall return a certified copy of the labor condition application to the employer or the employer's authorized agent or representative. The employer shall file the certified labor condition application with the appropriate INS office in the manner prescribed by INS. The INS shall determine whether each occupational classification named in the certified labor condition application is a specialty occupation or is a fashion model of distinguished merit and ability.

(2) *Determinations not to certify labor condition applications.* ETA shall not certify a labor condition application and shall return such application to the employer or the employer's authorized agent or representative, when either or both of the following two conditions exists:

(i) *When the Form ETA 9035 or 9035E is not properly completed.* Examples of a Form ETA 9035 or 9035E which is not properly completed include instances

where the employer has failed to check all the necessary boxes; or where the employer has failed to state the occupational classification, number of nonimmigrants sought, wage rate, period of intended employment, place of intended employment, or prevailing wage and its source; or, in the case of Form ETA 9035, where the application does not contain the signature of the employer or the employer's authorized representative.

(ii) *When the Form ETA 9035 or ETA 9035E contains obvious inaccuracies.* An obvious inaccuracy will be found if the employer files an application in error—e.g., where the Administrator, Wage and Hour Division, after notice and opportunity for a hearing pursuant to subpart I of this part, has notified ETA in writing that the employer has been disqualified from employing H–1B nonimmigrants under section 212(n)(2) of the INA or from employing H–1B1 nonimmigrants under 212(t)(3) of the INA. Examples of other obvious inaccuracies include stating a wage rate below the FLSA minimum wage, submitting an LCA earlier than six months before the beginning date of the period of intended employment, identifying multiple occupations on a single LCA, identifying a wage which is below the prevailing wage listed on the LCA, or identifying a wage range where the bottom of such wage range is lower than the prevailing wage listed on the LCA.

(3) *Correction and resubmission of labor condition application.* If the labor condition application is not certified pursuant to paragraph (a)(2) (i) or (ii) of this section, ETA shall return it to the employer, or the employer's authorized agent or representative, explaining the reasons for such return without certification. The employer may immediately submit a corrected application to ETA. A ''resubmitted'' or ''corrected'' labor condition application shall be treated as a new application by ETA (*i.e.,* on a ''first come, first served'' basis) *except that* if the labor condition application is not certified pursuant to paragraph (a)(2)(ii) of this section because of notification by the Administrator of the employer's disqualification, such action shall be the final decision of the Secretary and no application shall be resubmitted by the employer.

(b) *Challenges to labor condition applications.* ETA shall not consider information contesting a labor condition application received by ETA prior to the determination on the application. Such information shall not be made part of ETA's administrative record on the application, but shall be referred to ESA to be processed as a complaint pursuant to subpart I of this part, and, if such application is certified by ETA, the complaint will be handled by ESA under subpart I of this part.

(c) *Truthfulness and adequacy of information.* DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. The burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application.

[59 FR 65659, 65676, Dec. 20, 1994, as amended at 65 FR 80232, Dec. 20, 2000; 66 FR 63302, Dec. 5, 2001; 69 FR 68228, Nov. 23, 2004; 70 FR 72563, Dec. 5, 2005]

§ 655.750 What is the validity period of the labor condition application?

(a) *Validity of certified labor condition applications.* A labor condition application certified pursuant to the provisions of § 655.740 is valid for the period of employment indicated on Form ETA 9035E or ETA 9035 by the authorized DOL official. The validity period of a labor condition application will not begin before the application is certified and the period of authorized employment shall not exceed three years. However, in the event employment pursuant to section 214(n) of the INA (formerly section 214(m), addressing increased portability of H–1B status) commences prior to certification of the labor condition application, the attestation requirements of the subsequently certified application shall apply back to the first date of employment. Where the labor condition application contains multiple periods of intended employment, the validity period shall extend to the latest date indicated or three years, whichever comes first.

(b) *Withdrawal of certified labor condition applications.* (1) An employer who has filed a labor condition application